SUPREME COURT, U. S.

FILED

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IN THE

Supreme Court of the United States

Term, 19

No. 75-1151

ROBERT NICHOLSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on January 14, 1976, which affirmed the District Court's denial of Petitioner's Motion for a New Trial.

Opinions Below

The District Court for the Eastern District of Louisiana denied Petitioner's Motion for New Trial without opinion. The Fifth Circuit Court of Appeals affirmed by opinion (Appendix).

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Question Presented

Was Petitioner denied due process where his testimony before the indicting Grand Jury was suppressed by the trial court as having been given without counsel and *no* other evidence was presented to the Grand Jury on which to indict.

Statement

Petitioner, Robert Nicholson, was indicted together with his brother, William Nicholson, represented by separate counsel, and one James Edward Lawhon, in a single count indictment charging conspiracy in violation of 18 U.S.C. 371, to unlawfully transport in interstate commerce certain Bell System Telephone Equipment having a value in excess of Five Thousand ($5,000.00) Dollars. Lawhon pleaded guilty to this and other cases in the Eastern District of Louisiana, testified for the Government, and was eventually sentenced to three (3) years in prison. He related in detail his theft of substantial quantities of telephone equipment from the Southern Bell Service Centers in the New Orleans area in excess of some ninety (90) different occasions and his sale of this equipment to various legitimate companies and persons throughout the United States, including Nicho, Inc., an Ohio corporation, whose principal shareholders were Petitioner, Robert Nicholson, and William Nicholson (T.T. V.VII., pp. 33). Nicho, Inc. was also legitimately

engaged in the business of buying, selling, and refurbishing used telephone equipment which at the time was an endeavor shared by numerous other companies in a developing industry.

The Government's case was entirely circumstantial in that Lawhon, himself, testified that at no time did he tell the Petitioner that the equipment he was sending was in fact stolen by him (T.T. V.I., pp. 108). The facts of the case were substantially undisputed, the defense being that Petitioner did not know and had no reason to know that the equipment shipped from Louisiana was in fact stolen. Pursuant to the standing orders with Lawhon, Nicho, Inc. accepted and paid for, at current used telephone market prices, numerous shipments of telephones sent by Lawhon (T.T. V.I., pp. 40). This equipment was reconditioned to include in some instances the removal of the designation "Bell System—Not For Sale" markings, a practice not uncommon in the industry and one which Nicho, Inc. had been authorized to do in other unrelated instances as a normal practice with respect to purchased used equipment. The reconditioned equipment was then sold by Nicho, Inc. to various purchasers throughout the United States, including Olson Electronics, a major and national telephone retailer (T.T. V.I.I., pp. 34).

Petitioner filed a pretrial motion, including a Motion to Suppress his Grand Jury Testimony. His contention was that he was subpoenaed the night before he was to appear before the Grand Jury sitting in New Orleans and then called by telephone by the Assistant United States Attorney conducting the investigation and told that he could come without counsel. Nor was he advised that he was the subject of the Grand Jury investigation. The Grand Jury returned an indictment the same day without any other testimony being presented. None of the witnesses testify-

ing for the Government at trial, even on the circumstantial matters, appeared before the Grand Jury. Upon these facts, the District Court suppressed the Grand Jury testimony of Petitioner and his brother, William Nicholson, but refused to grant Petitioner's Motion to Quash the Indictment subsequently filed which contended that without defendant's testimony there existed no evidence on which to indict him. After a lengthy jury trial the Petitioner was convicted and eventually sentenced to two (2) years in prison, released on his own recognizance, and the execution of sentence stayed pending the appeal to the Fifth Circuit Court of Appeals. That Court affirmed the Judgment by Opinion. This Petition for a Writ of Certiorari followed.

Reasons for Granting the Writ

Petitioner is of course aware of this Court's holding in *United States v. Calandra*, 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974) that illegally obtained evidence may be put to the Grand Jury even though suppressed for trial purposes. Nor is he unaware of this Court's earlier holding in *Costello v. U.S.*, 350 U.S. 359, 76 S.Ct. 406, 100 L.Ed. 397, that normally an indictment is not to be challenged on the adequacy or competency of evidence before the Grand Jury. The Petitioner nevertheless does not understand this Court to have yet said that an indictment predicated on *no* evidence is constitutionally sufficient. Indeed, neither *Calandra, supra*, nor any other holding of this Court has seemingly repudiated Mr. Justice Burton's concurring opinion in *Costello, supra*, at 364 that:

> "Likewise it seems to me that if it is shown that the Grand Jury had before it no substantial or rationally

> persuasive evidence on which to base its indictment, that indictment should be quashed. To hold a person to answer such an empty indictment for a capital or otherwise infamous federal crime robs the Fifth Amendment of much of its protective value to the private citizen."

Where, therefore, there is a contention that *no competent evidence* underpins the indictment the trial court must at least make some judicial inquiry, *in camera* or otherwise, to validate the claim unless it is to be the law that a facially proper indictment can *never* be the subject of an inquiry even where *no evidence* has been presented to the grand jury to support it by *whatever* minimum standards.

As Leonard Hand observed in *Lawn v. U.S.*, 221 F.2d 668, 677:

> "If it appeared that no evidence had been offered that rationally established the facts, the indictment ought to be quashed; because then the grand jury would have in substance abdicated."

In the case *sub judice* no evidence was presented to the grant jury apart from Petitioner's suppressed statement. This Court in the interest of due process must set some minimum definitive standard as to when, if ever, the grand jury's action may be judicially reviewed, and reaffirm Mr. Justice Burton's expression that an indictment can not survive if based on the presentation of *no* competent evidence.

Conclusion

For the reasons set forth above, it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

STANLEY W. GREENFIELD,
Stanley W. Greenfield,
Attorney for Petitioner.

Certificate of Service

I hereby certify that a copy of the within Petition For A Writ Of Certiorari was mailed by United States Mail on February 11, 1976 to Robert H. Bork, Solicitor General of the United States, Department of Justice, Tenth and Constitution Avenue, Washington, D.C. 20530.

STANLEY W. GREENFIELD,
Stanley W. Greenfield,
Attorney for Petitioner.

APPENDIX

Opinion of the Fifth Circuit Court of Appeals, Filed January 14, 1976

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ROBERT NICHOLSON AND WILLIAM NICHOLSON,
Defendants-Appellants.

No. 74-3724

United States Court of Appeals,
Fifth Circuit.

Jan. 14, 1976

Defendants were convicted, after trial in the United States District Court for the Eastern District of Louisiana at New Orleans, Herbert W. Christenberry, J., of conspiracy to transport property worth more than $5,000 in interstate commerce, knowing the property to have been stolen. Defendants appealed. The Court of Appeals, Ainsworth, Circuit Judge, held that admission of testimony as to prices paid to a certain company for telephones was admissible to show knowledge of defendants, who paid only about one-fourth of such price for stolen telephones, that they were stolen. The Government had a duty to disclose details of its plea bargaining agreement with a coindictee who testified, and testimony produced in making such disclosure, including information concerning sales of other telephone equipment, was

properly received. Even testimony which had been suppressed for trial purposes was properly before the grand jury.

Affirmed.

1. Receiving Stolen Goods—8(2), 9(1)

In prosecution for conspiracy to transport stolen property in interstate commerce, testimony as to prices paid to certain company for telephones was admissible to show knowledge of defendants, who paid only about one-fourth of such price for stolen telephones, that they were stolen; weight of such evidence, in view of contention that such prices paid were not true prices paid because of intercorporate relationship, was for jury. 18 U.S.C.A. §§ 371, 2314.

2. Criminal Law—422(2)

In prosecution for conspiracy to transport stolen telephone equipment in interstate commerce, Government had duty to disclose details of its plea bargaining agreement with coindictee who testified, and testimony produced in making such disclosure, including information about sales of other telephone equipment, was properly received. 18 U.S.C.A. §§ 371, 2314.

3. Criminal Law—1035(9)

Conviction would not be reversed for trial judge's remarks concerning credibility of witness where judge was not asked to inquire of jury whether they overheard his remarks and was not asked to give jury cautionary instruction.

4. Criminal Law—1166.22(4)

In prosecution for conspiracy to transport stolen property in interstate commerce, trial judge's remark that witness was "bookkeeper without books" was not of sufficient consequential prejudice to warrant reversal. 18 U.S.C.A. §§ 371, 2314.

5. Indictment and Information—10.2(2)

Even though testimony was suppressed for trial purposes, it was properly before grand jury.

6. Conspiracy—47(3)

Where conspiracy was proved, only slight evidence was required to connect particular defendant with it, and record as a whole amply supported his participation therein. 18 U.S.C.A. § 371.

7. Criminal Law—829(15)

Where jury was properly instructed on reasonable doubt, court was not required to give requested reasonable hypothesis charge relative to circumstantial evidence.

8. Criminal Law—627.7(3)

Where defendants knew witnesses and could have examined them before trial and where statements were given to defense counsel before witnesses testified and information contained in the statements was not necessarily exculpatory, there was no erroneous failure on the part of the Government to give particular defendant all exculpatory material as required by judicial decision.

Appendix—Opinion of the Fifth Circuit Court of Appeals, Filed January 14, 1976.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before WISDOM, GEWIN and AINSWORTH, Circuit Judges.

AINSWORTH, Circuit Judge:

Appellants Robert J. Nicholson and William Nicholson appeal from their conviction after trial by jury of conspiracy to transport property worth more than $5,000 in interstate commerce, knowing the property to have been stolen, in violation of 18 U.S.C. §§ 371 and 2314. We have carefully examined each of the errors asserted by appellants and find them to be without merit. Accordingly, we affirm the convictions.

The Government's evidence was to the effect that appellants conspired with James Lawhon, a coindictee who pled guilty and testified for the Government as its principal witness. Lawhon, who was a former Bell Telephone Company employee, committed numerous burglaries of Southern Bell (now South Central Bell) properties in the New Orleans area on more than 104 occasions, and stole new and reconditioned telephones which he sold and shipped to appellants' company, Nichco, Inc., in Lexington, Ohio. From September 1970 continuously through December 1972 (except for several months, Lawhon stole and shipped approximately 200 such telephones, a substantial number being new equipment, each week to appellants. Lawhon communicated by long distance about these transactions with both defendants about once a week, or more than 100 times. Lawhon used fictitious names and addresses on all of the invoices

and packages shipped to Nichco, but pursuant to telephone arrangements Nichco checks were made payable to Lawhon and forwarded to his proper address in New Orleans. Lawhon was paid in excess of $40,000 by the Nicholsons over the 2½-year period involved. Nichco then sold the telephones, mostly to Olson Electronics, Akron, Ohio, for approximately double this amount. FBI agents observed some of Lawhon's burglaries and thefts of the telephones, also appellants each picking up a shipment of the telephones at the Columbus, Ohio Airport. Pursuant to a search warrant, a large number of Bell System telephones were recovered by the FBI at the Nichco premises in Lexington, Ohio.

Whenever a shipment of telephones arrived Nichco employees turned aside from other work and immediately took them out of the boxes which had "Bell System" and markings on the side and destroyed the boxes by crushing and burning them. Identification markings on the telephones, "Bell System Property—Not for Sale," were ground and buffed off by Nichco employees under direction of the Nicholsons.

Appellants each testified and denied the conspiracy or any knowledge that the telephones were stolen, though they admitted they made no inquiries of southern Bell to determine if the telephones could be sold.

[1] Appellants assert as error the admission of testimony by the Government, over their objection, as to prices paid by Southern Bell to Western Electric for such telephones. The purpose of this proof was to show knowledge of the Nicholsons that they were stolen since they paid Lawhon for the telephones only about ¼ of the

Western Electric price. Incidentally, when FBI agents searched Lawhon's home they found a copy of the South Central Bell Telephone-Western Electric stock price list in Lawhon's desk, and it was received in evidence at the trial. Appellants contend, however, that the price was not a true price because of the corporate relationship between Southern Bell and Western Electric. In our view the evidence was admissible, and given the corporate relationship referred to, the weight to be accorded the evidence was for the jury to determine. The evidence was, therefore, properly admitted by the trial Court.

[2] Appellants also assert as error the denial of their motions for mistrial based on questions by the Government of defense witnesses as to criminal or improper conduct by others in association with Robert Nicholson in other incidents of the sale of telephone equipment. As to this issue, the trial Court sustained defense objections to the sale of telephones by Nichco to Bennett and Beams. Also sustained was the defense's objection to questions to Assistant United States Attorney Bailey as to whether a plea bargain had been made with Lawhon relative to his testimony in other cases. However, on questions by the trial judge the Assistant United States Attorney testified that there were other cases besides the present one. The Government contends, and we agree, that it had the duty to disclose the details of its plea bargaining agreement with Lawhon and that the testimony produced was in response thereto. We find no error or prejudice under the circumstances.

[3,4] The next error complained of by appellants is that the trial judge made remarks concerning the credibility of the witness, Thomas, in a loud voice that could have been overheard by the jury. There is no way to determine on appeal whether this issue is well taken since

nothing was done by defense counsel to preserve this point for review. The district judge was not asked to inquire of the jury whether they over-heard his remarks and he was not asked to give the jury a cautionary instruction. Nor do we consider the remark of the trial Court that the witness, Rowlands, was "a bookkeeper without books," of sufficient consequence or prejudice to warrant reversal. The district Court later gave a cautionary instruction covering generally the subject matter of these objections.

[5] Appellants also contend that the district Court erred in denying the motion to quash the indictment. They contend that appellants' testimony alone constituted the evidentiary basis for the indictment, and that since the Court suppressed appellants' testimony before the grand jury, there was no competent evidence upon which the grand jury could have relied to support its indictment[1]. There is no indication in the record that the indictment was based solely on the testimony of the Nicholsons. The Assistant United States Attorney in oral argument on appeal informed the Court that there was other evidence presented to the grand jury which was not transcribed and offered to supplement the record in this regard if required by us. We do not believe supplementing the record is required. No attempt was made by appellants to preserve this point for appeal by proof that the only witnesses who testified at the grand jury proceeding were the Nicholsons. Even so, the contention is without merit since the

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[1] Apparently the motions to suppress on behalf of defendants were granted because the Assistant United States Attorney telephoned defendants the night before each was required to appear before the grand jury at New Orleans and each was told that the inquiry did not relate to culpability on his part and in response to inquiry, he would not need an attorney. Thus the Nicholsons appeared before the grand jury without consulting or having the benefit of counsel.

Supreme Court has recently decided that the exclusionary rule may not be extended to grand jury proceedings. The Nicholsons' testimony was, therefore, properly before the grand jury even though suppressed for trial purposes. *See United States v. Calandra,* 414 U.S. 338, 94 S.Ct. 613, 620-621, 38 L.Ed.2d 561 (1974); *United States v. Boerner,* 5 Cir., 1975, 508 F.2d 1064, 1068. In *Costello v. United States,* 350 U.S. 359, 363-364, 76 S.Ct. 406, 409, 100 L.Ed. 397, the Supreme Court said to "establish a rule permitting defendants to challenge indictments on the ground that they are not supported by adequate or competent evidence". . . "would run counter to the whole history of the grand jury institution. . ." That the trial judge followed the applicable law is shown by his denial of the motion to quash the indictment, despite his granting of the motion to suppress the grand jury testimony of Robert and William Nicholson.

Appellant William Nicholson also contends that there was error in denial of his motion for judgment of acquittal. He also contends that the Government failed to prove that the defendant had knowledge that the telephones involved were stolen. There was ample evidence, however, to connect this appellant with the transaction. FBI Agent Huddleston testified to an oral statement taken from William Nicholson that Nichco had been purchasing telephones from Lawhon for several years. William Nicholson said that his brother, Robert Nicholson, did most of the paper work and that he primarily traveled and sold equipment. He said he picked up a number of cartons of telephones received from Lawhon at the Columbus Airport and that they were then ground and buffed and the words "Bell System—Not for Sale" taken off because customers did not like to have this notation on the telephones. He said that Lawhon told him by telephone

that he had a legitimate source for obtaining the telephones; further, that he did not see how anyone could steal that quantity of telephones.

There was other evidence such as Lawhon's telephone admonitions to both Nicholsons to be careful; that he was concerned about the situation because he did not have any documents to back up the shipments of phones though they were coming through Western Electric. Lawhon testified that defendants told him they would send some documents obtained from New England Bell that would protect him but he never got them though he asked Robert Nicholson, and later William Nicholson, about it. Approximately 52 shipments of telephones were new or Class "C" (reconditioned) telephones consisting of more than 7,000 telephones. Most had the marking "Bell System Property—Not for Sale" and were shipped in the original boxes to defendants. The Bell System logo was ground and buffed off by defendants, as they said, at their customers' request. However, Mr. Corrigan, the representative of Olson Electronics, which purchased most of the stolen telephones involved, testified that defendant William Nicholson told him he had authorization by letter from the Bell System to remove the identification. Corrigan said he asked William Nicholson at least ten times to see the letter, which was never forthcoming, and that Nicholson told him the phones were being received from Burnup & Sims in Florida but they were coming from Southern New England Bell. He did not reveal that the telephones were coming from Lawhon.

[6] Only slight evidence was required to connect William Nicholson with the conspiracy and the record as a whole amply supports his participation in the conspiracy. *See United States v. Edwards*, 5 Cir., 1974, 488 F.2d 1154, 1157; *United States v. Perez*, 5 Cir., 1974, 489 F.2d 51, 72;

United States v. Goodson, 5 Cir., 1974, 502 F.2d 1303, 1305-1306; *United States v. Mayes*, 5 Cir., 1975, 512 F.2d 637, 651.

[7] There was no objection by defense counsel to the district judge's instructions to the jury and no merit, therefore, to the assertion by appellant William Nicholson of error in the failure to give requested jury instruction No. 3 of appellant William Nicholson relative to circumstantial evidence.[2] The requested instruction was for the so-called reasonable hypothesis charge relative to circumstantial evidence. In *United States v. Cortez*, 5 Cir., 1975, 521 F.2d 1, 4, we most recently held that it is not necessary for the trial judge to instruct the jury on the reasonable hypothesis test, that is, that the evidence must exclude every reasonable hypothesis other than that of guilt, when the jury is instructed properly on reasonable doubt. *See also United States v. Kolsky*, 5 Cir., 1970, 423 F.2d 1111, 1113, where we pointed out that the Supreme Court in *Holland v. United States*, 348 U.S. 121, 139-140, 75 S.Ct. 127, 137, 99 L.Ed. 150 (1954) said that "the better rule is that where the jury is properly instructed on the standards for reasonable doubt, such an additional instruction [*i. e.*, the reasonable hypothesis test] on circumstantial evidence is confusing and incorrect . . . ." *See also United States v. Rodriguez*, 5 Cir., 1975, 523 F.2d 738 [1975]; *United States v. Hansbrough*, 5 Cir., 1971, 450 F.2d 328, 328-329; *United States v. Boerner*, 5 Cir., 1975, 508 F.2d 1064, 1068-1069.

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[2] Requested jury instruction No. 3 reads as follows:

> I charge you that if you believe from the evidence that the government is relying on circumstantial evidence and this evidence does not exclude every other reasonable hypothesis but that the defendants had specific intent to commit the crime with which they have been charged, it is your duty to return a verdict of not guilty and acquit the defendants.

The trial Judge adequately and properly instructed the jury in this regard and pertinent parts of his charges are reproduced in the margin.[3] We find no error therein. *See United States v. Minichiello*, 5 Cir., 1975, 510 F.2d 576, 578; *United States v. Boerner, supra*, at 1068-1069.

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[3] The trial judge charged the jury on circumstantial evidence in pertinent part as follows:

> Evidence is of two kinds, direct and circumstantial.
>
> Direct evidence is evidence which, if believed, establishes the truth of a fact in issue without the aid of any inference or presumption.
>
> Circumstantial evidence, on the other hand, is evidence which, without going directly to prove the existence of the fact in issue, nevertheless gives rise to a logical inference that such fact does exist.
>
> It is not incumbent upon the government to prove the guilt of an accused by the use of direct evidence alone. Such guilt may be established by circumstantial evidence, as well as by direct evidence, or by direct and circumstantial evidence.
>
> To warrant a conviction on circumstantial evidence, each link of the chain of circumstances necessary to be established in order to prove the guilt of an accused must be itself proved by competent evidence beyond a reasonable doubt, and all the facts and circumstances necessary to show guilt must be consistent with each other and with the main facts at issue, the existence of which the evidence seeks to establish beyond a reasonable doubt, and all the circumstances taken together must be of such a nature as to lead to the legitimate conclusion, and produce a moral certainty, that the crime charged was committed and that the accused committed it, and such circumstantial evidence must not be inconsistent with any other rational conclusion.
>
> No greater degree of certainty is required where the evidence is circumstantial than where it is direct. The law demands a conviction whenever there is sufficient legal evidence to show guilt beyond a reasonable doubt, and circumstantial evidence is legal evidence.

(Footnote continued on following page)

(Footnote continued from preceding page)

The Court also charged the jury as follows on reasonable doubt:

I will now give you the charge on "reasonable doubt". You will remember that the government has the burden of proof in this case as to each defendant beyond a reasonable doubt.

In criminal cases, after a plea of not guilty, a presumption arises and continues throughout the trial to its end that the defendant is innocent of the things charged against him. The law does not require of a defendant that he prove himself innocent, nor is a defendant required to explain any matter which has not been proven, or about which you have a reasonable doubt; but it puts the burden on the government to prove his guilt by the evidence beyond a reasonable doubt. This principle of law is not mere idle theory, but it must be followed by you, so that if there are two reasonable theories equally supported by the evidence, one of which is consistent with the guilt of a defendant, and the other consistent with his innocence, you must adopt that theory consistent with innocence, and acquit him, because he could not be said to be guilty beyond a reasonable doubt.

The term "reasonable doubt", as used in this charge, does not mean just any possible doubt that you might have. It means such reasonable doubt as a careful, prudent and reasonable person ought to entertain in the circumstances proven. It means a doubt founded on a reason, a doubt for which you can give a reason.

It does not mean a vain, fanciful or whimsical doubt, nor does it mean a possible doubt created by the reluctance on the part of a juror to perform an unpleasant task.

It means a doubt arising out of the evidence that is based upon substantial grounds, and one is said to be convinced in a case of this kind beyond a reasonable doubt when, after an impartial comparison and consideration of all the evidence, you can conscientiously say that you feel an abiding conviction to a moral certainty of the truth of the charge. A reasonable doubt exists whenever, after careful and impartial consideration of all the evidence in the case, the jurors do not feel convinced to a moral certainty that a defendant is guilty of the charge.

If there is any reasonable doubt in your mind about the guilt of a defendant on a charge in the indictment, he is entitled to the benefit of such reasonable doubt and to acquittal on the charge.

(Footnote continued on following page)

[8] The contention of appellant William Nicholson that the Government did not give him all exculpatory material required by *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) is likewise without merit. This related to the failure of the Government to furnish to defense counsel prior to trial statements of witnesses Charles Thomas and William Kimmich taken by the FBI. It appears that appellants both knew the witnesses and could have examined them before trial. The statements were given, however, to defense counsel prior to the witnesses testifying. Moreover, it is not clear that the information contained in the statements was exculpatory. The Government contends, therefore, and we agree, that the statements were not *Brady* material and not producible in advance of trial. *See, e.g., United States v. Harris*, 5 Cir., 1972, 458 F.2d 670, 675-677. The witnesses took the stand on call of defendants and were examined in detail by defense counsel.

Finding no merit in any of the asserted errors of appellants, the judgment of conviction as to both defendants is affirmed.

(Footnote continued from preceding page)

If, on the other hand, you think his guilt is clear beyond a reasonable doubt, then it is your duty to find him guilty on the charge.

A reasonable doubt may arise not only from the evidence adduced, but also from a lack of evidence.

Since the burden is upon the prosecution to prove a defendant guilty beyond a reasonable doubt by proving beyond a reasonable doubt every essential element of the crime charged, a defendant has the right to rely upon failure of the prosecution to establish such proof.